



**FILED**

May 19 2008, 8:30 am

*Kevin L. Smith*

**CLERK**

of the supreme court,  
court of appeals and  
tax court

ATTORNEYS FOR APPELLEE DAMAX, INC:

**TIMOTHY S. SHELLY**  
**DEAN E. LEAZENBY**  
Warrick & Boyn, LLP  
Elkhart, Indiana

**J. MICHAEL LOOMIS**  
Fort Wayne, Indiana

ATTORNEY FOR APPELLEE NATIONAL  
FLIGHT SERVICE, INC.:

**JEFFREY K. EICHER**  
Greenfield, Indiana

**ROBERT T. SANDERS III**  
Sanders Pianowski, LLP  
Elkhart, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

HAWKEYE CHARTER SERVICE, INC. and  
TERRY GAROUTTE,

Appellants/Defendants/Third  
Party Plaintiffs/Cross-Defendants,

VS.

No. 20A03-0612-CV-561

DAMAX, INC.,

Appellee/Plaintiff,

and

NATIONAL FLIGHT SERVICE, INC.,

Appellee/Third Party Defendant/  
Cross-Plaintiff.

APPEAL FROM THE ELKHART SUPERIOR COURT  
The Honorable Evan S. Roberts, Judge  
Cause No. 20D01-0105-CP-294

---

**May 19, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

**Case Summary**

Hawkeye Charter Service, Inc. (“Hawkeye”), and Terry Garoutte, collectively, “Appellants,” appeal the trial court’s order granting summary judgment in favor of Damax, Inc. (“Damax”), and National Flight Service, Inc. (“National”). We affirm.

**Issues**

Appellants raise numerous issues, which we reorganize and restate as follows:

- I. Whether the trial court erroneously relied upon evidence not properly before it;
- II. Whether the court abused its discretion by allowing Appellants’ attorney to withdraw his appearance;
- III. Whether the court abused its discretion by not granting an extension of time to Appellants’ new counsel to respond to summary judgment motions filed by Damax and National;
- IV. Whether the court erred in finding Garoutte personally liable to Damax and National;
- V. Whether the court erred by concluding that Hawkeye and Garoutte are liable under a theory of conversion, rather than contract breach; and
- VI. Whether a hearing held twenty-four days after Damax filed its motion for entry of final judgment precluded Appellants from having thirty days in which to respond.

## Facts and Procedural History

Garoutte was the president of Hawkeye, an Indiana corporation. In 2000, Marc Shea was a charter customer of Hawkeye who had flown on trips with Garoutte. Shea told Garoutte that he was in the market for an aircraft. Garoutte told Shayne Koons, an aircraft broker, of Shea's interest in purchasing a plane. Thereafter, Garoutte and Koons worked collaboratively to find an aircraft for Shea.

Damax pilot Gil Holt indicated to his acquaintance, Koons, that Damax wished to sell a Swearingen Fairchild Merlin III SA-226T aircraft, serial number T-223 (the "Aircraft"). App. at 68, 97. Negotiations ensued, and eventually Shea orally agreed to pay \$675,000 for the Aircraft. *Id.* at 119. Garoutte and Koons were each to receive \$30,000 of the total price for brokering the deal. *Id.* at 100.

On November 10, 2000, Koons faxed to Holt an offer ("Initial Offer") to purchase the Aircraft for \$565,000 subject to pre-purchase inspection "to be conducted by National Flight Center – (Engine) & Hawkeye ... (Air Frame) ... as soon as possible." *Id.* at 130.<sup>1</sup> A pre-purchase inspection is "typical in most aircraft sales and consists of a physical inspection of the aircraft, its engines, and review of the log books." *Id.* at 133. In contrast to an annual inspection, a pre-purchase inspection "does not require that an aircraft be substantially dismantled." *Id.* Holt discussed the Initial Offer with William Glasson, president of Damax. Without signing the Initial Offer, Glasson instructed Holt to fly the Aircraft to Hawkeye's hangar at the Elkhart City Airport to facilitate the pre-purchase inspection. *Id.*

On November 15, 2000, Holt flew the Aircraft to Elkhart, picked up Garoutte, and then flew to Toledo, Ohio, where National was to perform an inspection – the extent of which is unclear. *Id.* at 68, 97, 105, 133.<sup>2</sup> National’s inspection determined that one of the Aircraft’s engines needed a “hot section repair.” *Id.* at 133. Holt left the log books with National and flew the Aircraft with Garoutte back to Elkhart. *Id.* at 133, 105. By November 18, 2005, the Aircraft was back in Hawkeye’s hangar and was subjected to further inspection, during which the Aircraft was taken apart in sections, fuel leaks were found, and it was discovered that the Aircraft was overdue for its annual inspection. *Id.* at 105, 106, 133.

Relying upon the information and estimates gleaned from inspection thus far and having been told by a National employee that no problems were found in the log books, Garoutte, as agent for Hawkeye, signed a November 22, 2000 offer (hereinafter, the “Final Offer”) to purchase the Aircraft – this time “as is.” *Id.* at 149, 109, 106. The one-page Final Offer listed a purchase price of \$550,000; required a \$65,000 deposit, which was “fully refundable if the buyer is unable to secure financing”; and contained the following clause: “In the event the Aircraft is required to be moved for the Pre-Purchase Inspection and Buyer

---

<sup>1</sup> The Initial Offer also contained a provision requiring a \$25,000 deposit by the buyer, which would be refunded if the Aircraft did not meet the buyer’s pre-purchase inspection. App. at 131.

<sup>2</sup> The description regarding what National was to do for Hawkeye is not readable in National’s November 15, 2000 work order. App. at 75. In Holt’s affidavit, he stated that he flew the Aircraft to National “to begin the pre-purchase inspection of the” Aircraft. *Id.* at 133. In his deposition, Garoutte testified that National was “hired to first perform an engine inspection” and that on November 15, 2000, the log books were left at National to conduct log book research. *Id.* at 105.

In his affidavit, Jim Clifford, National’s general manager, stated that Hawkeye contacted it on approximately November 8, 2000, to repair a leak and take oil samples from the engine and that on approximately November 15, 2000, National confirmed a power issue with the Aircraft’s left engine. *Id.* at 68. In addition, Clifford stated that in early December 2000, Hawkeye first requested National do a log book

withdraws his offer, . . . . The Buyer also agrees to have the Aircraft returned to the Seller in the condition in which it was delivered to the Pre-Purchase Inspection.” *Id.* at 149. Further, the Offer stated, “[u]pon acceptance of financing, Buyer will complete the purchase by December 1, 2000.” *Id.* (emphasis added). Glasson signed the Final Offer as seller and agent for Damax. *Id.*

Shea, who was anxious to have the Aircraft flying by the end of the year, asked Garoutte to go beyond the standard pre-purchase inspection, perform an annual inspection, and repair any items needed to make the Aircraft airworthy. *Id.* at 108, 111, 133, 160-61. On or about November 27, 2000, with assurances from Shea that his financing was in order, Garoutte agreed to Shea’s requests and contracted with T & C Aircraft Rebuilding, Inc. (“T & C”), of Canada to undertake the requested work. *Id.* at 108. Garoutte arranged for one of the Aircraft’s engines to be removed and sent to National for repair. *Id.* at 107. The repairs that Shea agreed to pay for required extensive disassembly of the Aircraft.

Approximately one week after the Final Offer was signed, Garoutte learned from National that it had just received two additional log books from Damax/Glasson/Holt. *Id.* at 109-10 (Garoutte deposition). These formerly missing log books described damage done to the Aircraft in an accident. *Id.*<sup>3</sup> Thereafter, Damax, having authorized only a pre-purchase

---

review, which National began on December 6 and completed on December 12, 2000. *Id.* Further, Clifford stated that National was neither asked to nor did it perform a pre-purchase inspection on the Aircraft. *Id.*

<sup>3</sup> This information was seemingly in contrast to a four-page flyer advertising the Aircraft’s inspection status as, *inter alia*, “No damage, All US Logs[.]” App. at 275-78. Contact information for both Hawkeye and Koons appears at the top of each page of the flyer. However, the source of the “no damage” description is uncertain.

inspection, expressed its concern to Garoutte over the substantial dismantling of the Aircraft. *Id.* at 151-56 (letters from Damax's counsel dated December 8, 2000, December 22, 2000, and January 5, 2001).

On February 22, 2001, Garoutte and Shea memorialized what had apparently been their understanding as to the Aircraft. *Id.* at 160-61 (hereinafter, the "Agreement"). That is, Shea would pay Hawkeye \$610,000 for the Aircraft, of which Garoutte and Koons would each take a \$30,000 commission. The Agreement also provided that Shea would "hold [Hawkeye] harmless for any and all liability in [Hawkeye's] efforts to sell [the Aircraft] to [Shea], including but not limited to [Hawkeye's] purchase of said [A]ircraft from [Damax]." *Id.* at 160. In addition, the Agreement specified that Shea would be responsible for all repairs he authorized and that if Shea did not buy the Aircraft, Hawkeye would attempt to sell it. *Id.*

For a while, Shea paid for the repairs. However, at some point he stopped, his financing fell through, and he breached the Agreement. *Id.* at 112.<sup>4</sup> Hawkeye was unable to pay to continue the repairs or to reassemble the Aircraft. *Id.* at 108. On April 27, 2001, Damax, by local counsel, demanded the return of the Aircraft fully assembled, intact, and airworthy. *Id.* at 163. Apparently, the Aircraft has not been reassembled, released, or returned, but instead remains in countless pieces in a hangar at the Elkhart City Airport. *Id.* at 100.<sup>5</sup> Repair and reassembly costs are estimated at \$331,418.86. *Id.* at 170, 167, 96.

---

<sup>4</sup> Interestingly, Koons received his full \$30,000 commission from Shea in the form of cash and stock. App. at 101.

<sup>5</sup> According to Damax, Hawkeye and Garoutte vacated the hangar within which the Aircraft sits after National City Bank foreclosed its mortgage on the hangar and the hangar was sold at a sheriff's sale to Elk

On May 15, 2001, Damax filed a complaint for replevin and damages against Appellants. Following an extension, Appellants filed, on July 6, 2001, an answer and counterclaim, which alleged fraud, material misrepresentation, and breach of contract. *Id.* at 186. That same month, Damax replied. In August 2001, Damax filed an amended complaint, which added Shea and his company, Cloud 9 Aviation, LLC (“Cloud 9”) as defendants, alleged conversion, negligence, breach of contract, fraud, replevin, and specific performance. *Id.* at 49-57. In September 2001, Shea and Cloud 9 answered. Although the court originally set a jury trial date of September 24, 2002, that date came and passed as lengthy mediation took place.

Meanwhile, in early 2002, the court ordered money escrowed, and cross claims were filed by Appellants, Shea, and Cloud 9. In May 2002, Damax filed its second amended complaint. Appellants responded in June 2002. In August 2002, counsel for Shea and Cloud 9 moved to withdraw, but was denied.<sup>6</sup> In April 2003, Appellants filed a third-party complaint against National alleging negligence, misrepresentation, and breach of contract. *Id.* at 62-66. In March 2004, three noteworthy events occurred. First, mediation finished unsuccessfully. Second, National filed a counterclaim against Appellants for payment on account. Third, two of Appellants’ three attorneys withdrew.

On October 12, 2005, National filed a motion for summary judgment against Appellants. Six days later, Appellants’ remaining counsel withdrew his appearance and

---

Aviation, LLC, in January 2005. *See* App. at 91 (Damax’s memorandum in support of summary judgment motion).

<sup>6</sup> Not until June 2005 was the motion to withdraw granted. App. at 15.

noted that Appellants had left a telephone message indicating that they had no objection to his withdrawal. *Id.* at 82-83, 16. On November 4, 2005, Garoutte attempted<sup>7</sup> to file a pro se response to National’s summary judgment motion and a cross motion for summary judgment. A summary judgment hearing was scheduled for December 14, 2005. On December 8, 2005, Damax requested and was granted an extension of time to file its summary judgment motion on January 14, 2006. By December 12, 2005, Appellants had retained new counsel, who requested a continuance of the summary judgment hearing. The hearing was reset for January 19, 2006. Damax timely filed its summary judgment motion on January 17, 2006. *See Ind. Trial Rule 6(A)*. At the January 19, 2006 hearing, Appellants requested an extension of time within which to file their amended motion for summary judgment and to respond to the other motions for summary judgment. The court “[took] the matter under advisement.” App. at 18.

On February 21, 2006, Appellants filed a motion to “renew” the previous extension of time. However, the court informed them that it had reached a decision on the motions and that an opinion would follow. On February 27, 2006, the court issued its eight-page opinion granting partial summary judgment to Damax and National, granting National’s motion to strike, and denying Appellants’ motion for summary judgment against Cloud 9 and request for additional time. *Id.* at 26-33.

---

<sup>7</sup> We use the word “attempted” because in the court’s February 27, 2006 order, it noted: “Garoutte is not a member of the Indiana Bar. Corporations must appear by an attorney in all cases. Ind. Code § 34-9-1-1. Garoutte is unable, under the law, to represent Hawkeye in this matter; accordingly, the responses filed with respect to Hawkeye should be stricken from the record.” App. at 32. In the court’s June 21, 2006 order, it

On April 17, 2006, Appellants and Damax each filed a motion to correct error. *Id.* at 38. On May 9, 2006, National filed a supplemental affidavit of Clifford. On May 25, 2006 the court held a hearing at which counsel for Hawkeye and Garoutte conceded that National “is owed something for their labor, their services, and something for their parts.” Tr. at 16; App. at 35. On June 21, 2006, the court issued an order denying Appellants’ motion to correct error, granting Damax summary judgment against Shea and Cloud 9, adopting National’s proposed \$211,854.49 judgment against Hawkeye and Garoutte, jointly and severally, and granting Damax’s motion to strike Garoutte’s affidavit. App. at 34-39. On July 20, 2006, Appellants filed a motion for relief from judgment, a motion for stay of proceedings to enforce judgment, and a motion for extension of time. *Id.* at 39.

On August 1, 2006, the court on its own motion ordered that the escrow money not be released until further hearing. *Id.* at 22. On August 7, 2006, Damax filed a motion for reconsideration of the August 1, 2006 order and for entry of final judgment against Appellants. *Id.* The court set the pleadings for hearing on August 31, 2006. *Id.* at 22-23. On August 18, 2006, Appellants filed a motion to correct error and supporting memorandum. *Id.* at 23. On August 31, 2006, the court held a hearing, which was attended by counsel for Damax, Appellants, and National; at the conclusion of that hearing, the court took all pending matters under advisement. *Id.*

On September 29, 2006, the court issued a detailed order that resolved a variety of issues. *Id.* at 38-43. It denied all motions by Appellants and released the escrow funds to

---

clarified that while it struck Garoutte’s pro se response on behalf of Hawkeye, it did not strike Garoutte’s pro se response on his own behalf. *Id.* at 35.

Damax. *Id.* at 38-43. It entered final judgments in favor of Damax and against Hawkeye for \$3,134,153.60 and against Garoutte personally for \$2,802,734.80. It denied Damax's motion for final judgment against Appellants on their counterclaims for fraud and breach against Damax. Finally, it denied Appellants' motion to correct error and any other pending motions. Hawkeye filed a notice of appeal on October 26, 2006. A status conference was scheduled for December 21, 2006, for trial of any remaining claims.

After being fully briefed, this appeal was assigned to this office on June 12, 2007. However, upon receipt of notice that a bankruptcy petition had been filed by Garoutte on June 8, 2007, the case was placed on hold. In the meantime, we requested and received periodic status reports; we thank counsel for their assistance in this regard. On March 4, 2008, this chambers received a "Notice of Order of Relief From Stay," which was dated January 9, 2008, and resumed work upon this appeal.

### **Discussion and Decision**

When reviewing a motion for summary judgment, we stand in the shoes of the trial court and apply the same standard that the trial court applied, without giving any deference to the trial court's ultimate decision. *Ind. Ins. Co. v. Allis*, 628 N.E.2d 1251, 1252 (Ind. Ct. App. 1994), *trans. denied*. "Summary judgment is warranted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Ackles v. Hartford Underwriters Ins. Corp.*, 699 N.E.2d 740, 742 (Ind. Ct. App. 1998) (citing Ind. Trial Rule 56(C)), *trans. denied*. When making our decision, we consider only those matters that have been designated by the parties to the trial court for consideration. *Id.*

Summary judgment is especially appropriate in the context of contract interpretation. *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 667 (Ind. 1997). “When construing the meaning of a contract, our primary task is to determine and effectuate the intent of the parties.” *Trustcorp Mortg. Co. v. Metro Mortg. Co.*, 867 N.E.2d 203, 212 (Ind. Ct. App. 2007). In doing so, we must determine whether the language of the contract is ambiguous. Unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. *Whitaker v. Brunner*, 814 N.E.2d 288, 293 (Ind. Ct. App. 2004), *trans. denied*. Thus, if the language of the instrument is unambiguous, the parties’ intent will be determined from the four corners of the contract. *Id.*

If an ambiguity arises because of the language used in the contract and not because of extrinsic facts, its construction is purely a question of law to be determined by the trial court. *Trustcorp*, 867 N.E.2d at 212. However, if the language of a contract is ambiguous and its meaning must be determined by examining extrinsic evidence, its construction is a matter for the fact-finder. *Id.*

### ***I. Evidence Properly Before the Court***

Appellants argue that many of the exhibits submitted and relied upon by Damax in support of its summary judgment motion lacked foundation and were, therefore, inadmissible hearsay. Appellant’s Br. at 10 (citing Ind. Evidence Rule 902(9)). Appellants make a similar argument regarding several of National’s exhibits. They maintain that the various defective exhibits should be struck and that absent their admissibility, there was insufficient evidence on which to base the judgments (summary and final) against Garoutte and Hawkeye. *Id.* at 10-11.

“Under T.R. 56(E), affidavits supporting or opposing a summary judgment motion must be made upon the personal knowledge of the affiant, must affirmatively show that the affiant is competent to testify as to the matters covered in the affidavit and must set forth facts which would be admissible in evidence.” *Bankmark of Florida, Inc. v. Star Fin. Card Servs., Inc.*, 679 N.E.2d 973, 980 (Ind. Ct. App. 1997) (citing *L.K.I. Holdings, Inc. v. Tyner*, 658 N.E.2d 111, 117 (Ind.Ct.App.1995), *trans. denied*); *see also* Ind. Evidence Rule 901 (requiring authentication of documents before they can be considered as evidence). As a general rule, a court should disregard any inadmissible information contained in an affidavit. *LeMaster v. Methodist Hosp., Inc.*, 601 N.E.2d 373, 376 (Ind. Ct. App. 1992). “However, a party complaining that an affidavit is defective has a duty to direct this complaint to the trial court, and the failure to do so constitutes waiver.” *Bankmark*, 679 N.E.2d at 980. Similarly, failing to object to a trial court regarding the authenticity of an exhibit constitutes waiver of that issue for appellate review. *Verma v. D.T. Carpentry, LLC*, 805 N.E.2d 430, 433 (Ind. Ct. App. 2004).

Here, the record reveals that, in the court below, Appellants failed to object to the exhibits that they now attempt to challenge on appeal. Rather, upon receiving Damax’s January 19, 2006 motion for summary judgment, Appellants filed an extension request. Moreover, after a month passed, Appellants requested another extension. During the months that followed Damax’s January 19, 2006 filing of its summary judgment motion, Appellants filed a variety of motions. These included the following: an April 17, 2006 motion to correct errors, a July 20, 2006 motion for relief from judgment/motion for stay of proceedings to enforce judgment/motion for extension of time, and an August 18, 2006 motion to correct

error and supporting memorandum. In none of these motions did Appellants object to the materials presented by Damax in support of its motion for summary judgment.

Given these circumstances, even if the materials that were submitted contained inadmissible evidence, Appellants have waived any error in their admission. *See Am. Mgmt., Inc. v. MIF Realty, L.P.*, 666 N.E.2d 424, 429 (Ind. Ct. App. 1996) (party's failure to file motion to strike or otherwise object to affidavit on grounds that affidavit was not based on personal knowledge resulted in waiver of issue on appeal); *Enderle v. Sharman*, 422 N.E.2d 686, 691 (Ind. Ct. App. 1981) (failure to object to abstract of title offered in support of summary judgment motion on grounds that abstract violated best evidence rule and constituted hearsay resulted in waiver on appeal); *Jordan v. Deery*, 609 N.E.2d 1104, 1108 (Ind. 1993) (citing party's failure to present argument first to trial court, supreme court affirmed court of appeals' waiver of the following argument: party contended that panel opinion should not have been considered by trial court on motions for summary judgment because it was allegedly hearsay since no one with actual knowledge signed affidavits to verify authenticity of decision). Appellants' failure to raise an admissibility challenge until now precludes us from determining that the trial court erred in considering the materials provided by Damax and National in support of their respective summary judgment motions. *See Bankmark*, 679 N.E.2d at 980.<sup>8</sup>

---

<sup>8</sup> Bankmark had argued that affidavits (1) contained improper references to an offer of compromise made by Bankmark, (2) were not based on the personal knowledge of the affiants, (3) contained legal conclusions instead of a statement of facts, and (4) contained inadmissible hearsay. 679 N.E.2d at 979-80. Bankmark's failure to make an objection to the trial court waived those objections.

## *II. Withdrawal of Appellants' Attorney*

Appellants next contend that the trial court abused its discretion by permitting their counsel to withdraw, yet not directing them to find new counsel or granting them extra time in which to do so. They assert that this treatment was unfair given the “suddenness of [attorney Michael] Christofeno’s withdrawal and the lack of notice to them of the order.” Appellants’ Br. at 11. Appellants argue that they were left “in the lurch” while National’s motion for summary judgment was pending. *Id.* at 12. For support, they cite one case, a criminal appeal, for the general definition of what constitutes an abuse of discretion. *Id.* (citing *Flake v. State*, 767 N.E.2d 1004, 1008 (Ind. Ct. App. 2002)).

The decision regarding whether an attorney’s motion to withdraw should be granted is left to the trial court’s discretion. *Smith v. Smith*, 779 N.E.2d 6, 8 (Ind. Ct. App. 2002). An abuse of discretion exists only when the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. *D.A. v. Monroe County Dep’t of Child Servs.*, 869 N.E.2d 501, 507 (Ind. Ct. App. 2007).

According to Christofeno’s motion to withdraw, which he signed on October 18, 2005,

1. On the 2nd day of September, 2005, [Christofeno] sent a letter to each of his clients [Appellants] via certified mail with return receipt requested seeking their consent to withdraw as the attorney of record in the above-captioned cause of action, or in the alternative, a Motion would be filed twenty-one (21) days after the receipt of the same pursuant to the local court rules.
2. [Appellants] received the said letter on September 4, 2005.
3. [Appellants] left a telephone message indicating that they had no objection to the said withdrawal.

App. at 82-83. Christofeno attached to his withdrawal motion a copy of the September 2, 2005 letter, which reads in pertinent part as follows:

On August 25, 2005, I appeared on your behalf at a status conference in the above-captioned matter. The Court scheduled the case for a four-day jury trial commencing Tuesday, May 23, 2006 at 8:30 A.M.

In addition, the Court scheduled a final pre-trial conference for Thursday, March 16, 2006 at 8:30 A.M. The Court set a discovery deadline of December 16, 2005, and a dispositive motions deadline of October 14, 2005.

I continued to represent you in this case so that you would have representation at the status conference. I trust you will find that I have fully and completely advised you of the important dates in this litigation.

*As you are aware, I have never wanted to represent you in this litigation in any other manner except as the local counsel with Bob Barrett handling the litigation. I have serious concerns that you will be able to pay for my services in this case. I also believe that you and I have a difference of opinion as to the outcome in this case. For these reasons and as we have discussed on a number of prior occasions, I wish to withdraw my appearance for you and the corporations in this litigation.*

Accordingly, I have enclosed an original and one copy of a Consent for you to execute and return to me which would show that you voluntarily consent and agree to my withdrawal as your attorney of record. In the alternative, please accept this correspondence as my *notice to you that I will file a Motion with the Court to withdraw as your attorney of record twenty-one (21) days after the date of this letter as is required by our local rules.*

*In either event, you will need to secure other representation for yourself and the corporations in this litigation. I would anticipate that DAMAX will file a Motion for Summary Judgment in the very near future. Whether we are talking about the Motion for Summary Judgment or the trial itself, I believe you require legal representation.*

I would appreciate your returning the Consent to me so that I may file it with the Court or advising me that you will not sign the same. *In either event, you will need to obtain other counsel to represent you in this matter.*

*Id.* at 85-86 (emphases added).

Given the history that Christofeno's letter outlines and the clear directives Christofeno provides in writing to Appellants, their allegations of "suddenness" and "lack of notice" do not ring true. In light of this letter, as well as the fact that, upon receipt, Appellants called to

say they had no objection to the withdrawal motion, we cannot find the court abused its discretion in granting Christofeno's motion to withdraw. The decision granting the withdrawal was not clearly against the logic and effect of the facts and circumstances before the court.

### ***III. Denial of Request for Extension of Time***

Appellants assert that the trial court abused its discretion by denying their new counsel's request for a continuance. Michael Loomis entered his appearance for Appellants on December 12, 2005, and immediately asked for additional time with respect to the hearing on the summary judgment motions. *Id.* at 33. The court permitted a continuance to January 19, 2006, when a status conference would be held. At that status conference, Appellants requested another extension of time within which to file their amended motion for summary judgment and to respond to the motions for summary judgment filed by National and Damax. The request was taken under advisement. On February 21, 2006, Appellants renewed their request for an extension, but were advised by the court that "a decision ha[d] been reached on the respective Motions and an Opinion is forthcoming." *Id.* at 18. Within its February 27, 2006 order, the court noted:

that this case has been pending since May 15, 2001, [Appellants] have previously been represented by multiple attorneys [omitted footnote indicates five] throughout the litigation, Garoutte has represented himself and filed numerous pleadings herein and has had an ample period of time to address this litigation. Accordingly, the court denies [Appellants'] request.

*Id.* at 33.

A trial court has the discretion to grant or deny a continuance, and its decision will not be overturned on appeal absent clear abuse of that discretion. *TrinityBaptist Church v.*

*Howard*, 869 N.E.2d 1225, 1230 (Ind. Ct. App. 2007), *trans. denied*. “[W]ithdrawal of legal counsel does not entitle a party to an *automatic* continuance.” *Riggin v. Rea Riggin & Sons, Inc.*, 738 N.E.2d 292, 311 (Ind. Ct. App. 2000) (emphasis added). We have explained:

The unexpected withdrawal of counsel, untimely though it may be, does not necessarily entitle a party to a continuance when it is not shown that counsel thereafter employed was unable to prepare and conduct a proper case. Under some circumstances, however, denial of a continuance based on the withdrawal of counsel may be error when the moving party is free from fault and his rights are likely to be prejudiced by the denial.

*Koors v. Great Southwest Fire Ins. Co.*, 530 N.E.2d 780, 783 (Ind. Ct. App. 1988) (citations omitted); *see also Ungar v. Sarafite*, 376 U.S. 575 (1964).<sup>9</sup> On appeal, we consider “whether the denial of a continuance will result in the deprivation of counsel at a crucial stage in the proceedings; whether new counsel will have adequate time to prepare the case taking into account the case’s complexity; and whether delay will prejudice the opposing party to the extent sufficient to justify denying the continuance.” *Homehealth, Inc. v. Heritage Mut. Ins. Co.*, 662 N.E.2d 195, 198 (Ind. Ct. App. 1996), *trans. denied*.

As already noted, it is unlikely that Christofeno’s withdrawal came as a surprise to Appellants. Further, Appellants were able to retain Loomis, their new counsel, within less

---

<sup>9</sup> The *Ungar* court stated:

The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrawise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request was denied.

376 U.S. at 589-90 (citations omitted).

than two months of Christofeno's departure. During that interval between counsel, Garoutte filed a pro se response to National's motion for summary judgment and a cross motion for summary judgment. Although it was eventually struck as to Hawkeye, that pleading could have been a good starting place for Loomis, once he was hired.

Upon entering his appearance on December 12, 2005, Loomis sought and was granted a continuance through January 19, 2006. The court granted this first extension despite opposition by National. Thereafter, Loomis had more than a month to familiarize himself with the case and prepare any responses. Appellants had those same five weeks to provide Loomis with any necessary background. Given that they had been involved in the case since 2000, when the facts leading to the controversy originally occurred, and given that during the five years that had elapsed since the case's inception, Appellants, via their various counsel, had filed several pleadings and engaged in lengthy negotiations, they were uniquely qualified to assist Loomis in getting up to speed. They could hardly be described as having had no chance to address the issues raised by the case or as being caught unaware regarding the theories of the case.

After the five-week extension had expired, Loomis did not file a response, an amended response, a summary judgment motion, or a cross-motion on behalf of Appellants. Instead, on January 19, 2006, Loomis filed for another continuance. This time, the court took the continuance request under advisement. When the parties met again thirty-three days later, it does not appear that Appellants offered or filed any substantive motions. The only motion Loomis apparently filed at the February 21, 2006 hearing was a "renewed" motion for extension of time.

Under the circumstances presented, Appellants have not convinced us that the court abused its discretion when it denied the motion for continuance. *See Troyer v. Troyer*, 867 N.E.2d 216, 219 (Ind. Ct. App. 2007) (concluding no abuse of discretion where court denied wife’s motion to continue in order to allow wife’s fourth attorney time to prepare). “This is a situation in which the trial court *could have* granted the [Appellants’] motion for an extension of time, but it did not abuse its discretion in refusing to grant the motion.” *McGuire v. Century Surety Co.*, 861 N.E.2d 357, 360 (Ind. Ct. App. 2007) (noting that a general claim of “being too busy to timely respond to another party’s motion does not require a court to grant a motion for an extension of time to file a response, although it *may permit* a trial court to grant such a motion.”) (emphasis added). The *McGuire* court also pointed out that counsel should not have assumed that a motion for extension would be granted; to the contrary, “without having received immediate notice from the trial court that the motion [for extension] would be granted, counsel should have assumed it would be denied and acted accordingly.” *Id.* at 360 n.2; *see also Hess v. Hess*, 679 N.E.2d 153 (Ind. Ct. App. 1997) (holding that trial court abused its discretion in denying motion for continuance where nothing in the record showed that party intended or could foresee that counsel would withdraw so close to hearing and the denial of continuance deprived him of counsel at crucial stage).

In any event, Appellants definitely had opportunities to argue their position in subsequently filed motions. *See* April 17, 2006 motion to correct error; July 20, 2006 motion for relief from judgment, stay of proceedings to enforce judgment, extension; and August 18, 2006 motion to correct error.

#### *IV. Personal Liability of Garoutte to Damax and National*

Next, Garoutte challenges the determination that he is personally liable to Damax and National. He argues that even including the exhibits that were “otherwise inadmissible, there is no evidence to support piercing the corporate veil to reach” Garoutte as an individual. Appellants’ Br. at 14. Garoutte maintains that at all relevant times, Hawkeye was a corporation, and he was representing it in his capacity as president and/or agent. *Id.* at 14-15.

“[T]he fundamental principle of American corporate law [is] that corporate shareholders sustain liability for corporate acts only to the extent of their investment and are not held personally liable for the *acts attributable to the corporation.*” *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994) (emphasis added). Moreover, a corporate officer is not personally liable for the torts of a corporation merely because of his office; however, if he/she has “an additional connection with the tort,” personal liability may be appropriate. *Roake v. Christensen*, 528 N.E.2d 789, 791-92 (Ind. Ct. App. 1988) (citing *Bowling v. Holdeman*, 413 N.E.2d 1010 (Ind. Ct. App. 1980)). In codifying these tenets, our legislature stated: “Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation *except that the shareholder may become personally liable by reason of the shareholder’s own acts or conduct.*” Ind. Code § 23-1-26-3(b) (emphasis added).<sup>10</sup>

---

<sup>10</sup> In 1985, our legislature

created the Indiana General Corporation Law Study Commission to evaluate the viability of completely revising the Indiana General Corporation Act. 1985 Ind. Acts 2490-91. Based on the Commission’s recommendations, the General Assembly passed the Indiana Business

There appears to have been no discussion in the court below about needing to pierce the corporate veil to find Garoutte personally liable. We suspect this is because Garoutte's liability on the conversion claims was "due to his own actions" rather than being premised upon the mere fact that he was president of Hawkeye. *Jamrosz v. Res. Benefits, Inc.*, 839 N.E.2d 746, 765 (Ind. Ct. App. 2005), *trans. denied*. That is, Garoutte was not acting on behalf of Hawkeye when he agreed with Shea to go beyond the authorized pre-purchase inspection and disassemble the Aircraft for various repairs and upgrades without Damax's consent. Indeed, Garoutte hired and made arrangements for T & C to undertake Shea's requested work. Garoutte also arranged for one of the Aircraft's engines to be removed and sent to National for repair. There is no indication that Garoutte made these decisions and acted on them on behalf of Hawkeye. That being the case, we cannot quarrel with the determination of Garoutte's personal liability on the conversion counts.

This case is somewhat similar to *Howard Dodge & Sons, Inc. v. Finn*, 181 Ind. App. 209, 391 N.E.2d 638 (1979), wherein a corporate secretary-treasurer was held personally liable for his connection with a corporation's conversion. The officer participated with other corporate employees in the unauthorized removal of some equipment that had been furnished for a newly constructed home. *Howard*, 181 Ind. App. at 210, 391 N.E.2d at 640; *see also Am. Indep. Mgmt. Sys., Inc. v. McDaniel*, 443 N.E.2d 98 (Ind. Ct. App. 1982) (finding

---

Corporation Law ("BCL") in 1986. 1986 Ind. Acts 1377-1532 (current version at Ind. Code Ann. §§ 23-1-17-1 to -54-3 (West 2005)).

The Commission based the BCL largely on the 1984 version of the Revised Model Business Corporation Act ("RMA"), a guide for state business corporation statutes published by the Committee on Corporate Laws of the American Bar Association's Section on Business Law. Ind. Code Ann. § 23-1-17 Introduction (West 2005).

corporate president personally liable for fraud where he held meeting at which he made false representations and approved brochure containing false representations). In *Howard*, *McDaniel*, and the present case, the party ultimately found personally liable had “an additional connection with the tort.” See *Roake*, 528 N.E.2d at 791-92. Again, the employee or officer’s position alone did not lead to personal liability. Rather, personal liability was triggered by the tortfeasor’s own act or conduct that did not fall within the ambit of “acting on behalf of” the corporation.

Damax’s breach of contract claim presents a different analysis. In its February 27, 2006 order granting partial summary judgment, the court stated:

*Hawkeye* failed to return the [Aircraft] to Damax in the same condition in which it was delivered for the pre-purchase inspection. *Hawkeye* clearly breached an express term of the contract. Damax is entitled to summary judgment entered in its favor and against *Hawkeye* on its breach of contract claim as it relates” to the November 22, 2000 agreement.

App. at 31 (emphases added). In zeroing in on *Hawkeye* as the Buyer and the entity that breached the contract, the court noted that the Final Offer was printed on *Hawkeye* letterhead and was signed as follows:

HAWKEYE CHARTER SERVICE, INC.  
Agent for: Hawkeye  
By: Terry L. Garoutte Pres.  
Date: 11-22-00

*Id.* at 59.

As for Garoutte, the court noted, “Damax bases its claims against Garoutte largely upon theories of conversion and breach of contract,” yet it does not appear that the court

---

*In re Guidant Shareholders Derivative Litig.*, 841 N.E.2d 571, 572-73 (Ind. 2006).

granted summary judgment to Damax on its breach of contract claim against *Garoutte* personally. *Id.* at 31. In fact, the final judgment against Garoutte was \$331,418.80 less than the judgment against Hawkeye. The court explained the difference as follows: “The judgments against Hawkeye ... included an award of \$331,418.80 for the costs to reassemble the [Aircraft] not awarded against Garoutte personally – which was not requested in [Damax’s] motion for entry of final judgment.” *Id.* at 40. Thus, the damages for which Garoutte is personally liable derive from the conversion claims.

Although not spelled out, we assume that the different amounts ultimately sought and awarded stem from the facts that Garoutte was clearly acting in his capacity as president of Hawkeye when he signed the Final Offer. Accordingly, for the court to find him personally liable for Hawkeye’s alleged breach of contract, Damax would have had to pierce the corporate veil. *Escobedo v. BHM Health Assocs.*, 818 N.E.2d 930, 932 (Ind. Ct. App. 2004) (noting that generally, “individual shareholders of a corporation are not personally responsible for the obligations of the corporation”). As our supreme court has set out, this is no easy task.

Indiana courts are reluctant to disregard a corporate entity, but will do so to prevent fraud or unfairness to third parties. The burden is on the party seeking to pierce the corporate veil, to establish “that the corporation was so ignored, controlled or manipulated that it was merely the instrumentality of another, and that the misuse of the corporate form would constitute a fraud or promote injustice.”

When a court exercises its equitable power to pierce a corporate veil, it engages in a highly fact-sensitive inquiry. As a general statement, the factors to be considered include whether the corporate form has been adhered to, whether corporate assets are treated as such or as personal assets, and whether there has been an attempt to deceive third parties.

*Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1232 (Ind. 1994) (citations omitted).

From what we can discern, Damax made no allegations of the factors required to pierce the corporate veil on the contract breach. Thus, personal liability against Garoutte on Damax's contract breach claim did not lie. *See id.* at 1233 ("These facts simply do not give rise to the inference that Winkler acted other than as an agent for the corporation."); *see also Strodman v. Integrity Builders, Inc.*, 668 N.E.2d 279, 283 (Ind. Ct. App. 1996) (piercing corporate veil not warranted where assuming defendant, while acting alone on behalf of company, negotiated contract and agreed to contractual obligations; this does not demonstrate that he "acted in a way that ignored, controlled or manipulated [] corporate form. It is not unusual for a corporate officer to act in such a manner in the capacity as corporate president."), *trans. denied*; *Mishawaka Brass Mfg. v. Milwaukee Valve Co.*, 444 N.E.2d 855 (Ind. Ct. App. 1983) (concluding that sole shareholder of predecessor corporation, who purchased equipment of predecessor corporation and leased it back for business purpose, not subject of individual liability because there was no intent to defraud).

We next turn to National's claim on account, for which it received summary judgment and now holds a \$211,854.49 judgment against Hawkeye and Garoutte, jointly and severally. App. at 32, 37. National contends that there is no need to pierce the corporate veil because "personal liability of Garoutte is established by his signature on" work orders directed to National. National's Br. at 3-4. Garoutte's signature does appear on two work orders, and unlike on the Final Offer, there is no notation that he is acting as an agent or corporate officer. *Id.* at 75, 78. Further, Appellants' counsel at the May 25, 2006 hearing stated: "I think this is in the form of a concession; and that is that Hawkeye ... *and Garoutte* would concede that National [] is owed something for their labor, their services, and something for

their parts.” Tr. at 16; App. at 35. Counsel continued: “And if [National’s] not owed that on the basis of a contractual relationship with the work orders, then they’re probably owed that on the basis of quantum meruit. *We don’t dispute that.*” Tr. at 16. Garoutte’s challenge to personal liability on National’s claim is unavailing at this point.

### ***V. Conversion versus Contract Breach***

Appellants characterize this case as “nothing more than a contract dispute about the Aircraft and a breach for failure to pay the contract price.” Appellants’ Br. at 16. They contend that the Final Offer was ambiguous as to whether Hawkeye’s continued control of the Aircraft was authorized. *Id.* Appellants assert that the most the designated evidence shows is that Hawkeye caused “damage” because of its repairs, but not an appropriation of the Aircraft. *Id.* Accordingly, Appellants argue that the conversion determination should be reversed.

In reviewing whether summary judgment was properly granted on the conversion claims, we begin with what we hope is a helpful review of the various types of conversion.<sup>11</sup>

Indiana Code Section 35-43-4-3 provides that a person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion, a class A misdemeanor. “A person engages in conduct ‘intentionally’ if, when he engages in the conduct, it is his conscious objective to do so.” Ind. Code § 35-41-2-2(a). “A person engages in conduct ‘knowingly’ if, when he engages in the conduct, he is aware of

---

<sup>11</sup> Confusion apparently remains regarding the types of conversion and their requirements. *See* App. at 29 (February 27, 2006 summary judgment opinion, which states, “The elements for a claim of tortious conversion are the same as for a claim of criminal conversion[.]”).

a high probability that he is doing so.” Ind. Code § 35-41-2-2(b). Indiana Code Section 35-43-4-1(a) provides that to “exert control over property” means to obtain, take, carry, drive, lead away, conceal, abandon, sell, convey, encumber, or possess property, or to secure, transfer, or extend a right to property. A person’s control over property of another person is “unauthorized” if it is exerted without the other person’s consent, in a manner or to an extent other than that to which the other person has consented, or by promising performance that the person knows will not be performed. *See* Ind. Code § 35-43-4-1-(b)(1), -(2), and -(6). If the State proves these elements beyond a reasonable doubt, a criminal defendant may be imprisoned for not more than one year and may be fined not more than \$5,000. Ind. Code § 35-50-3-2.

Pursuant to Indiana Code Section 34-24-3-1,<sup>12</sup> a victim of criminal conversion may bring a civil action for conversion. If that person proves the elements of criminal conversion by a preponderance of the evidence, he/she can recover up to three times the actual damages, the costs of the action, and reasonable attorney’s fees. *Jamrosz*, 839 N.E.2d at 758. A criminal conviction for conversion is not a condition precedent to recovery in a civil action for conversion. *Huff v. Biomet, Inc.*, 654 N.E.2d 830, 835 (Ind. Ct. App. 1995), *abrogated on other grounds by St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699 (Ind. 2002).

A plaintiff may also bring a civil action alleging the tort of conversion. Tortious conversion is similar to criminal conversion, but has no mens rea element. *Computers*

*Unlimited, Inc. v. Midwest Data Sys., Inc.*, 657 N.E.2d 165, 171 (Ind. Ct. App. 1995).

Conversion, as a tort, consists either in the appropriation of the personal property of another to the party's own use and benefit, or in its destruction, or in exercising dominion over it, in exclusion and defiance of the rights of the owner or lawful possessor, or in withholding it from his possession, under a claim and title inconsistent with the owner's. *Id.*

While good faith is no defense to the tort of conversion, *see id.*, the potential liability for tortious conversion is far less than the punitive damages that may be levied against a defendant found liable in a civil action for criminal conversion. Rather, generally, damages for tortious conversion of property are measured by the market value of the property at the time of conversion. *See Coffel v. Perry*, 452 N.E.2d 1066, 1069 (Ind. Ct. App. 1983). Damages are restricted to actual losses sustained as a proximate result of the conversion and are mitigated by return of the property to the owner or by application of the property to its lien. *Id.* "Where converted property is returned, damages for the deprivation of the use of the property may be measured by the fair rental value for the period of conversion." *Id.*

Damax president Glasson stated in his affidavit: "Damax did not consent to anything beyond the standard pre-purchase inspection and further did not consent to the extensive disassembly and repairs on the aircraft agreed to and performed by Hawkeye and Mr. Shea."

App. at 98. Glasson also stated in his affidavit that upon being informed by Garoutte that the Aircraft had a fuel leak and needed an engine hot section, Glasson and Garoutte agreed to

---

<sup>12</sup> This statute was recently referred to as the "Crime Victims Statute." *See Prime Mortgage USA, Inc. v. Nichols*, 49A04-0610-CV-586, 2008 WL 1810125 (Ind. Ct. App. Apr. 23, 2008).

reduce the purchase price of the Aircraft, with the buyer accepting the Aircraft “as is” with no warranties regarding its condition. *Id.* at 97-98, 59 (November 22, 2000 Final Offer).

On December 8, 2000, Damax’s counsel faxed to Garoutte and Hawkeye a letter that expressed the following concern: “We understand that a ‘pre-purchase inspection’ was authorized by Mr. Glasson. We understand that a considerably more involved inspection has been commenced which was not authorized by Mr. Glasson, the result of which is that the [A]ircraft has been substantially dismantled in various areas.” *Id.* at 151-52. Two weeks later, Damax’s counsel mailed and faxed to Garoutte and Hawkeye a letter indicating that Glasson “is very concerned about the unauthorized and previously undisclosed repairs substantially underway with regard to the engine, fuel tanks, and avionics, which could result in charges in excess of \$175,000.00. All such charges for these repairs are solely the responsibility of your firm, and [] Glasson accepts no liability whatsoever for such charges.” *Id.* at 153-54. On January 5, 2001, Damax’s counsel mailed and faxed to Garoutte and Hawkeye a letter noting its growing concern that Hawkeye “continues to possess [Damax’s] [A]ircraft and continues to make unauthorized repairs, all without proper documentation, and that no funds have been remitted for December or January to cover [Damax’s] damages.” *Id.* at 155. That same letter strongly suggested that certain steps be taken “to determine if [Damax] wish[es] to continue [its] efforts to revive the failed transaction.” *Id.* at 155-56.

Via affidavit, broker Koons stated that a pre-purchase inspection does not require that an aircraft be substantially dismantled, and that Garoutte and Hawkeye substantially dismantled the Aircraft without Damax’s authorization. *Id.* at 100. In his affidavit, Damax

pilot Holt stated: “A pre-purchase inspection is typical in most aircraft sales and consists of a physical inspection of the aircraft, its engines, and review of the log books.” *Id.* at 133.

As for Garoutte’s viewpoint, he explained:

The problem was after the agreement was made to buy the airplane, [Shea] advised me that he had financing on a Monday morning, the next Monday morning after this [November] 22nd.

[Shea] had asked me how long it would take to finish the plane so he could fly on it. He wanted to fly on it before the year [2000] ended. I advised him that we had three to four weeks worth of work. A big part of it was removing the engine and having the engine hot section performed. The other unknown was the fuel cell repair leaks, which we had to hire someone else to come in and perform.

He told me he had financing arranged to close on that following Friday. And [Shea] asked me to start the work. I said, well, I can’t do that unless you’ve got financing guaranteed. And if there’s a delay, then that’s a problem.

He then told me that he had a backup financing plan by using Dave Hoefer, who used to be a partner of mine, who apparently started [Shea] in his business. And [Shea] led me to believe that if there was any delay with the financing company, that Dave would loan him the money to buy the airplane until the financing was secured.

And I said, well, if we start working on this airplane and something falls through, you’re going to have to pay for these repairs. And then an adjustment be made later on, you know, when the plane is bought by someone else. He said, that’s fine, I’m going to buy the airplane.

So that’s how we started. We started – National came out and pulled the engine. And we hired these Canadians [T & C] to come and start repairing the fuel leaks, which had to be repaired in order to make the plane airworthy.

*Id.* at 107-08. In addition, Garoutte confirmed that it was not typical to make alterations to an aircraft during a pre-buy inspection, but that he and Shea had agreed to get the engine and fuel leak repairs underway. *Id.* at 108-09. The former was expected to cost between \$80,000 and \$100,000, and the latter was quoted at 800 to 1600 hours of labor. *Id.*; *see also id.* at 127 (Shea’s deposition testimony that he agreed to pay for engine repair and fuel tank repair).

The aforementioned evidence meets the preponderance of evidence standard required

to prove that Appellants were aware that they were possessing Damax's Aircraft without Damax's consent, in a manner or to an extent other than that to which Damax had consented. Stated otherwise, the undisputed designated evidence establishes that Garoutte and Hawkeye knowingly or intentionally exerted unauthorized control over Damax's Aircraft. Thus, the court did not err in determining there is no genuine issue as to any material fact and that Damax is entitled to judgment as a matter of law on its civil action for criminal conversion. Having met the elements of a civil action for criminal conversion, the undisputed facts easily meet the less rigorous elements of tortious conversion. Specifically, Hawkeye and Garoutte withheld the Aircraft from rightful owner Damax, which under the circumstances presented, constitutes tortious conversion. Therefore, the court did not err in granting summary judgment to Damax on its conversion claims against Hawkeye and Garoutte.

Despite having applied the correct nondeferential standard of review and having determined that the court did not err in granting summary judgment on the conversion claims, we find this case is troubling. We are hard-pressed to imagine that this scenario was the type that the legislature envisioned when it provided for treble damages, costs, and fees. Instead, this seems to have been a situation in which one party set certain events into motion based upon representations that eventually proved untrustworthy, and by the time the realization(s) hit, it was too late.

In addition, we have difficulty with the fact that the court left open Appellants' counterclaims of fraud, breach, etc. *See* App. at 38-43 (September 29, 2006 order denying all motions by Appellants, releasing escrow funds to Damax, entering final judgments against Hawkeye for \$3,134,153.60 and against Garoutte for \$2,802,734.80, yet denying Damax's

motion for final judgment against Appellants on their counterclaims for fraud and breach against Damax).

While intuitively appealing in a complicated case to attempt to decide and dispose of certain parts before moving onto other parts, this approach at times can create new problems. For instance, if eventually merit is found in Appellants' allegations of fraud, etc., the doctrine of unclean hands<sup>13</sup> would seem to make recovery of treble damages by Damax against Appellants improper. That is, if ultimately it is determined that Damax purposely misled Appellants regarding the "no damage" inspection status of the Aircraft, if Damax intentionally delayed sending two log books that detailed damage to the Aircraft to National, and if National's log book review was negligently performed (i.e., it should have realized the log books were missing), then Damax should not be the beneficiary of equitable/punitive damages levied against Appellants.

The problem, we believe, boils down to this: the parties' claims and operative facts are inextricably intertwined. The conundrum is compounded by, or perhaps has been created by, woefully inadequate contracts. Although the facts do technically fit within the confines of a civil action for criminal conversion, they read much more like a complex contractual dispute or tortious conversion (which lacks both the mens rea element and the accompanying treble damages). This is not unusual. Case law touches on the interrelation of conversion and contract disputes. *See, e.g., Midland-Guardian Co. v. United Consumers Club, Inc.*, 499

---

<sup>13</sup> "The unclean hands doctrine is an equitable tenet that demands one who seeks equitable relief to be free of wrongdoing in the matter before the court." *In re Estate of Johnson*, 855 N.E.2d 686, 701 (Ind. Ct. App. 2006), *trans. denied*. The alleged wrongdoing must be intentional and must have an immediate and

N.E.2d 792 (Ind. Ct. App. 1986) (affirming criminal conversion finding where no contractual right to funds). Another example may be found in *Whitaker*, 814 N.E.2d at 297, where we noted that the mens rea requirement differentiates criminal conversion from the more innocent breach of contract or failure to pay a debt situation that the statute providing for a civil action for criminal conversion was intended to cover. *See also Jamrosz*, 839 N.E.2d at 758-61. Along those same lines, we have pointed out on more than one occasion that the legislature did not intend to criminalize bona fide contract disputes. *Greco v. KMA Auto Exch., Inc.*, 765 N.E.2d 140, 147 (Ind. Ct. App. 2002); *NationsCredit Commercial Corp. v. Grauel Enter., Inc.*, 703 N.E.2d 1072, 1078-79 (Ind. Ct. App. 1998) (concluding that contract is ambiguous when it is reasonably susceptible of different constructions, and “[i]t is this same ambiguity that precludes a finding of the required mens rea” for criminal conversion), *trans. denied*; *but see Greco*, 765 N.E.2d at 148 (concluding that criminal conversion was proved by preponderance of evidence where despite attorney’s statement to dealer “that they had no right to hold Greco’s vehicle and that it must be returned[,]” two years after purchase date, dealer still had not returned truck).

Nevertheless, we are constrained to agree that summary judgment on the conversion claims was proper. However, in light of the serious concerns outlined above, had we been the court below, we may have reserved calculation of final judgment awards until all claims, counterclaims, etc. were resolved.

## ***VI. Hearing Twenty-Four Days After Motion for Entry of Final Judgment***

---

necessary relation to the matter being litigated. *Id.* “The purpose of the unclean hands doctrine is to prevent a party from reaping benefits from his misconduct.” *Id.*

Finally, Appellants argue that Damax's August 7, 2006 motion for entry of final judgment was "in effect, a second motion for partial summary judgment," and thus Appellants should have had thirty days in which to file a response. Appellants' Br. at 18-19 (citing Ind. Trial Rule 56(C), -(I)).

Assuming without deciding that Damax's August 7, 2006 motion was a motion for summary judgment, we have been provided with no transcript for the hearing that was held on August 31, 2007. Therefore, we cannot say whether Damax's August 7, 2006 motion was argued or discussed. Be that as it may, the decision granting Damax's motion was not issued until September 29, 2006. Accordingly, had Appellants wished to file a written response to the motion, they could have done so by September 7, 2006 (thirty days after August 7, 2006), and the court could have considered it prior to its ruling three weeks later. Given the Appellants' decision not to file a response at that time, we find this last argument unpersuasive.

Affirmed.

BAKER, C. J., and FRIEDLANDER, J., concur.